

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02**

UNITED STATES POSTAL SERVICE,)	
)	
Respondent)	
)	
and)	Case 02-CA-219434
)	
)	
NATIONAL ASSOCIATION OF LETTER, CARRIERS,)	
)	
Charging Party)	

**RESPONDENT'S REPLY
TO GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for Respondent:

Roderick Eves
Deputy Managing Counsel
Law Department – NLRB
United States Postal Service
1720 Market Street, Room 2400
St. Louis, MO 63155-9948
(314) 345-5864
(314) 345-5893 TELEFAX
roderick.d.eves@usps.gov

TABLE OF CONTENTS

Table of Authorities	i
Exceptions/Supporting Brief	1
1. The ALJ made several erroneous findings of fact	1
2. Should the Board conclude that the ALJ erred with respect to his factual findings, it must also conclude that the ALJ erred when he concluded that Mr. DiPasquale was motivated by union animus when he terminated Mr. White	4
Certificate of Service	9

TABLE OF AUTHORITIES

<u>Adams & Associates, Inc.</u> , 363 NLRB No. 193, slip op. (2016)	5
<u>Bodolay Packaging Machinery</u> , 263 NLRB 329 (1982)	4
<u>Clorox Co. v. Sterling Winthrop, Inc.</u> , 117 F.3d 50 (2d Cir. 1997)	4
<u>Consolidated Edison Co.</u> , 323 NLRB 910 (1997)	4
<u>Hoodview Vending Co.</u> , 359 NLRB 355 (2012)	5
<u>Libertyville Toyota</u> , 360 NLRB 1298 (2014), enf. 801 F.3d 767 (7 th Cir. 2015)	5
<u>New Jersey Bell Telephone Co.</u> , 300 NLRB 42 (1990)	4
<u>Southwestern Bell Telephone Co.</u> , 227 NLRB 1223 (1977)	4
<u>Tomafek, Inc.</u> 333 NLRB 1350 (2001)	5
<u>U.S. v. Spangelet</u> , 256 F.2d 338 (2d Cir. 1958)	3
<u>Wright Line</u> , 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1 st Cir. 1981), cert. denied 455 U.S. 989 (1982)	4

Respondent hereby files this Reply Brief to General Counsel's Answering Brief to Exceptions Filed by Respondent, pursuant to Section 102.46(h) of the NLRB's Rules and Regulations. In its Answering Brief, General Counsel argues that the ALJ correctly concluded that (1) Mr. White requested union representation in the presence of Mr. DiPasquale, (2) Mr. DiPasquale was motivated by animus when he terminated Mr. White and (3) Respondent failed to meet its burden of showing that Mr. DiPasquale would have discharged Mr. White absent his request for union representation. Despite General Counsel's endorsement of the ALJ's findings, the ALJ plainly erred when he relied upon facts not supported by the record and then relied upon those unsupported facts to conclude that Mr. DiPasquale was motivated by union animus when he terminated Mr. White.

1. The ALJ made several erroneous findings of fact

General Counsel does not dispute any of the following essential facts raised in Respondent's Exceptions.

- Mr. DiPasquale was not present in the supervisors' office with Mr. White and Supervisor Bardis, during which Mr. White asked for help or to talk to someone. Tr. (pp. 47-48).
- Once in the conference room, but about 3 to 5 minutes before Mr. DiPasquale came into the conference room, Mr. White "asked for help, and I asked for someone – to speak with someone that could help me again. And no one answered me." Tr. (pp. 49-50, 58).
- Mr. DiPasquale, alone, made the decision to terminate Mr. White on April 6, 2018, when he terminated Mr. White "on the spot" during their meeting in the meeting in the conference room. Tr. (pp. 51, 80, 84, 118).
- After Mr. DiPasquale terminated Mr. White and told him to leave the building, Mr. White said "I'm not going anywhere until I talk to my shop steward." Tr. (pp. 51-52, 58-59, 87-88).

Therefore, Mr. DiPasquale could not have known that Mr. White asked for union representation before Mr. DiPasquale terminated him unless Mr. White said something to Mr.

DiPasquale while they were in the conference room together. Mr. White's only description of his conversation with Mr. DiPasquale before being terminated is as follows:

So to my recollection, to the best of my knowledge, I sat down and tried to explain to Ed the misunderstanding, that I was not trying – I was not saying I didn't want – I wasn't going to Scarsdale; I just wasn't going there from the bus at that time. If he would have sent me to Scarsdale, I would have no choice but to do it. Ed told me to be quiet, it's not my time to talk. Then that's when I asked them – that's when I asked if there is anybody I can – I – so Ed asked – Ed told me this – this is not my time to talk. That's when I then – that's when we – that's when I said, I have rights. I said, I have rights; Ed told me I have no rights. And that's when I got a little snappy and said, I'm an American, I know I have rights. And that's when he terminated me.

Tr. (p. 51).

When comparing this testimony with the ALJ's findings of fact, however, it becomes obvious that the ALJ erred. Specifically, the ALJ found as follows:

Postmaster DiPasquale entered a few minutes later, and White began to tell him that he was not refusing to go to Scarsdale, just that he was already on the bus en route to New Rochelle. **White asked again for someone to speak to, but Mr. DiPasquale told White that this was not his time to talk. White responded saying that 'I have rights, and I want to talk to somebody,' to which Mr. DiPasquale replied, 'you have no rights.'** White insisted that 'I'm an American, and I know I do,' but DiPasquale just told him at that point that he was terminated, and told Cail to call the police.

...

Moreover, **I credit White's testimony that he asked for someone immediately upon DiPasquale's arrival**, which is consistent with the fact that he had already asked both Bardis and Cail for someone to speak to and had his request denied and/or ignored. And I credit White's testimony that DiPasquale dismissed his request, as it was consistent with DiPasquale's admitted belief that he was not entitled to one.

Finally, I do not credit DiPasquale's claim that White did not ask for a representative until after he was terminated. Both he and Cail acknowledge that White was speaking from the moment that DiPasquale entered the room, before any action was taken. Additionally, **it is undisputed that White repeatedly told all three supervisors that he had rights, and I find that having already requested a representative from each of them, it was plain to all three managers what rights he was referencing.**

ALJ Decision (pp. 7-8)(emphasis added).

Contrary to the ALJ's findings of fact, Mr. White did not "ask[] again for someone to speak to." The most we can discern from his somewhat confusing testimony is that he "asked if there is anybody I can" Mr. White never completed this sentence, so we don't know what more he was going to say, if anything. He may have stopped in the middle of the sentence because he knew what he was saying was incorrect. Or he may have intended to complete the sentence in some other way, such as I "asked if there is anybody who could go to Scarsdale instead of me." In short, we just don't know and it was error for the ALJ to assume he was asking for someone to speak to.

More to the point, Mr. White never said "I have rights, and I want to talk to somebody," which the ALJ put in quotes. By putting that phrase in quotes, one would assume it was taken directly from the hearing transcript. But it was not – it appears nowhere in the transcript. General Counsel likewise does not claim anywhere in its Answering Brief that such a statement was ever made by Mr. White. Accordingly, it was error for the ALJ to fabricate such testimony. U.S. v. Spangelet, 256 F.2d 338, 341-42 (2d Cir. 1958)(judge's finding that defendant's testimony before the grand jury was consistent with his testimony at trial was plainly contrary to the transcript and constituted error).

The ALJ also stated in his decision that "I credit White's testimony that he asked for someone immediately upon DiPasquale's arrival." But as set forth above, Mr. White never claims to have asked for someone immediately upon Mr. DiPasquale's arrival. Mr. White testified that he asked for someone when he himself entered the conference room, but 3 to 5 minutes before Mr. DiPasquale entered the conference room. Once both men were in the conference room, Mr. White at most asked only "if there is anybody I can," without finishing the sentence. Again, it was error for the ALJ to find that Mr. White asked for someone immediately upon Mr. DiPasquale's arrival in the conference room.

The ALJ also found that “it is undisputed that White repeatedly told all three supervisors that he had rights, and I find that having already requested a representative from each of them, it was plain to all three managers what rights he was referencing.” But, as already discussed, there is no evidence that Mr. White had “already requested a representative from” Mr. DiPasquale at the time he told Mr. DiPasquale that he had rights. As such, it was again error for the ALJ to conclude as such.

Finally, to the extent Mr. White’s testimony, or the evidence in general, is not clear on these issues, it must be interpreted in Respondent’s favor. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 55 (2d Cir. 1997)(it is a well-settled rule of law that ambiguities in evidence are to be resolved against the party who has the burden on that evidentiary point). As set forth in more detail, below, the General Counsel retains the ultimate burden of proving unlawful motivation. Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).¹

2. Should the Board conclude that the ALJ erred with respect to his factual findings, it must also conclude that the ALJ erred when he concluded that Mr. DiPasquale was motivated by union animus when he terminated Mr. White.

The General Counsel concedes that the appropriate legal framework here is set forth under Wright Line, 251 NLRB 1083 (1980), enforced 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989. Therefore, the burden is on the General Counsel to establish that a substantial or

¹ The only other factual basis to conclude that Mr. White requested union representation in his meeting with Mr. DiPasquale, but before his termination, was that he said “I have rights” and then repeated, “I’m an American, I know I have rights.” While there are no magic words, an employee’s request must be sufficient to put the employer on notice that he wishes to have union representation. Consolidated Edison Co., 323 NLRB 910, 916 (1997). Neither the ALJ nor the General Counsel have identified any Board or court decision holding that a mere declaration of rights constitutes a request for union representation. General Counsel instead cites to several inapposite cases, holding that “I would like to have someone there that could explain to me what was happening” or “[d]o I need a shop steward” or “[s]hould I have a union representative present.” or “do I need a witness” all were sufficient notice of a desire to have union representation. See, respectively, Southwestern Bell Telephone Co., 227 NLRB 1223, 1227 (1977); Consolidated Edison Co., *supra*, 323 NLRB at 916; New Jersey Bell Telephone Co., 300 NLRB 42, 47-49 (1990); and Bodolay Packaging Machinery, 263 NLRB 320, 325-26 (1982). Mr. White, however, said nothing to Mr. DiPasquale that so clearly suggested he wanted union representation – at least not until after he was terminated. There are many “rights” that Mr. White may have intended, as “an American” or otherwise, but he did not sufficiently put Mr. DiPasquale on notice of a desire for union representation. Indeed, Mr. DiPasquale’s unrebutted testimony was that “I believe his comments to me was he didn’t have to follow my instructions; he didn’t have to do or – respond to anything that we had to say; that he had rights to be in America.” Tr. (p. 117).

motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's protected activity. Under the Wright-Line framework, as developed by the Board, the General Counsel must establish the following elements – the existence of protected activity, the employer's knowledge of that activity and union animus on the part of the employer. Adams & Associates, Inc., 363 NLRB No. 193, slip op. at 6 (2016); Libertyville Toyota, 360 NLRB 1298, 1301 (2014); enf. 801 F.3d 767 (7th Cir. 2015). "It is axiomatic that an employer could not have been unlawfully motivated if it was unaware of protected activity." Tomafek, Inc., 333 NLRB 1350, 1356 (2001).

Once the General Counsel has met its initial showing that the protected activity was a motivating or substantial reason in the employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. Hoodview Vending Co., *supra*, 359 NLRB at 359. Ultimately, the General Counsel retains the ultimate burden of proving unlawful motivation. Wright Line, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

Based on the facts in the record, Mr. DiPasquale had no idea that Mr. White had requested union representation or had engaged in any protected activity whatsoever. Therefore, ipso facto, his decision to terminate Mr. White on the spot could not have been motivated by union animus. As stated by the Board in Tomafek, Inc., above, "an employer could not have been unlawfully motivated if it were unaware of the protected activity."

While that should be the end of the analysis, both the ALJ and General Counsel argue that Mr. DiPasquale's motivation to terminate Mr. White on the spot was pretextual because he included other reasons in the letter of termination, issued the following day. This argument borders on the absurd. "Pretextual" is defined as asserting one alleged purpose or motive in order to cloak the real reason or motive. It does not preclude a manager from including

additional reasons in a final letter of termination. Indeed, the ALJ and General Counsel would have the Board believe that a manager must have all the reasons to terminate an employee crystallized in his mind at the moment he first believes that termination may be appropriate. That is not practical or what happens in the real world. Here, Mr. DiPasquale knew, “on the spot” during his meeting with Mr. White, that he would terminate Mr. White – and did so verbally. And, as set forth above, his reasons for doing so could not have been a request by Mr. White for union representation because Mr. DiPasquale was not aware of any such request.

Both the ALJ and General Counsel also attempt to distort Mr. DiPasquale’s testimony when stating that he admitted he did not rely on two reasons later advanced in the letter of termination. Reading the testimony in context, the ALJ asked Mr. DiPasquale what was the “real reason” for terminating Mr. White. Mr. DiPasquale answered that it was neither Mr. White’s AWOL nor the issue about going to Hartsdale. Tr. (p. 122). Rather, “[i]t was because of the events at the meeting.” Id. Indeed, the real reason had to be the events at the meeting because Mr. DiPasquale terminated Mr. White on the spot and was not yet fully aware of the AWOL and the issue about going to Hartsdale. However, Mr. DiPasquale became aware of the AWOL² and learned more about Mr. White’s refusal to go to Hartsdale before he issued the letter of termination the next day. According to Mr. DiPasquale, all of these issues are serious and warranted termination. Tr. (pp. 84-86).

² Contrary to General Counsel’s assertion at page 13 of his Answering Brief, there was documentation of Mr. White’s AWOL. Specifically, on April 4, 2018, Mr. White was absent without leave (AWOL). Tr. (pp. 225-226, 253-254); R Ex. 9 (p. 29) and R. Ex. 10 (p. 1). Mr. White further testified that, without advance approval, he called to report that he would not be able to come to work because he had to watch his daughter. Tr. (pp. 253-55).

WHEREFORE, Based on the foregoing, Respondent respectfully submits that the instant complaint be dismissed in its entirety.

Respectfully submitted,



Roderick Eves, Deputy Managing Counsel
Law Department – NLRB
United States Postal Service
1720 Market Street, Room 2400
St. Louis, MO 63155-9948
(314) 345-5864
(314) 345-5893 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this this 26th day of June, 2019, I served Respondent's foregoing

Reply Brief as follows:

NATIONAL LABOR RELATIONS BOARD

(VIA E-FILING)

1015 Half Street, SE
Washington, DC 20570-0001

REGION 02

(VIA E-FILING)

John J. Walsh
Regional Director
National Labor Relations Board -- Region 02
26 Federal Plaza, Suite 3614
New York, NY 10278-3699

CHARGING PARTY

(VIA E-MAIL)

Joe DeStefano, President
NALC Branch 137
P.O. Pox 1133,
Poughkeepsie, NY 12062-1133
nalcbranch137@gmail.com



Roderick Eves